No. 83-115

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IN THE

SUPREME COURT OF
THE UNITED STATES

October Term 1982

BONNIE J. BRIECE,

Petitioner,

v.

WILLIAM E. BRIECE and
GLADYS G. BRIECE,

Respondents.

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals' decision in this diversity case ignored the applicable Illinois law and highly persuasive authority from a comparable, neighboring jurisdiction, to reach a result compelled by the law of no jurisdiction.

2. Whether the Court of Appeals' reliance on the doctrine of abatement, rather than on the inter vivos effect of a valid temporary order, strips the state of Illinois of its ability to regulate the conduct of parties to a divorce proceeding in the period between filing and final judgment, and therefore alters the substantive and remedial law in an area traditionally reserved to the states.

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are contained in the caption of the case in this Court.

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OPINIONS BELOW

The Court of Appeals delivered two opinions in this action. The first, dated November 2, 1982, was withdrawn before it could be officially reported. It is printed at Appendix A27-A57. The Court then issued orders denying, and later granting, respondents' request for rehearing. Those orders are printed at Appendix A59-A61. The Court's second opinion (dated March 29, 1983) is officially reported at 703 F.2d 1045 and is printed at Appendix A1-A26.

The opinion of the United States District Court for the Western District of Missouri, Western Division, from which appeal was initially taken, has not been officially reported. It is printed at Appendix A62-A78.

JURISDICTIONAL GROUNDS

The judgment sought to be reviewed is that of the United States Court of Appeals for the Eighth Circuit, entered March 29, 1983, affirming the judgment of the United States District Court for the Western District of Missouri.

Defendant-appellant Bonnie J. Briece filed a timely petition for rehearing en banc, and on May 3, 1983 her petition was denied. The court's order is printed at Appendix A-61. This petition for certiorari was filed within sixty days of that date.

Jurisdiction to review the judgment is conferred upon this Court by 28 U.S.C. §1254(a).

STATUTE

The relevant portions of the Illinois Marriage and Dissolution of

Marriage Act, Ill. Rev. Stat. ch. 40, §§101 et seq., are printed in the Appendix at A79-A84.

STATEMENT OF THE CASE

A. The Parties and the Facts

The relevant facts in this case are simple and undisputed, but unusual. Petitioner Bonnie J. Briece ("Bonnie") is the widow of Ronald A. Briece ("Ronald"), who died on May 2, 1981. Respondents William E. Briece and Gladys G. Briece are Ronald's parents.

Bonnie and Ronald were married approximately six and one-half years. There were no children born to the marriage. In 1979, Bonnie was seriously injured in an automobile accident. She became physically disabled and was dependent upon Ronald for her support.

Approximately three months before Ronald's death, Bonnie filed a petition for legal separation or divorce

in the Circuit Court of Cook County, Illinois. At that time, Ronald had left the marital home in a suburb of Chicago and was living in Kansas City, Kansas. After she filed the petition, Bonnie learned that her husband was suffering from lung cancer and had been hospitalized. Bonnie was concerned about her substantial medical and support needs during the divorce proceedings, so she filed a petition for temporary relief. On April 28, 1981 attorneys for Bonnie and Ronald appeared in the Circuit Court of Cook County, pursuant to Bonnie's petition. Ronald's attorney thereupon informed the motion judge that Ronald was, indeed, gravely ill and furthermore, that during the preceding week, Ronald had removed Bonnie as beneficiary of the group term

life insurance policy provided by his employer, the Loctite Corporation, and had substituted his parents.

Upon learning these facts, the motion judge immediately entered an order directing Ronald to reinstate and maintain Bonnie as the beneficiary until further order of court or until ten days from entry of the order, when the matter was set for further hearing. Four days after the order was entered, on May 2, 1981, Ronald Briece died having failed to comply with the order and reinstate Bonnie as beneficiary.

B. Procedural History

While on appeal to the United States Court of Appeals for the Eighth Circuit, this case followed an unusual procedural path. The parties submitted

opening, responsive and reply briefs, and oral argument was heard on May 19, 1982. On November 2, 1982 a divided panel filed its decision reversing the judgment of the district court and remanding the case with instructions to enter summary judgment in favor of Bonnie, awarding her the proceeds of the insurance policy on the life of her husband.

Bonnie's parents filed a petition for rehearing on November 13, 1982. Bonnie's response was filed on December 22, 1982. On February 18, 1983 the Court of Appeals denied the petition for rehearing.

Four days later counsel for Bonnie received a telephone call from the office of the Clerk of the United States Court of Appeals for the Eighth Circuit. The caller advised counsel

that the Court was withdrawing its order denying the petition for rehearing and had substituted an order vacating the November 2, 1982 opinion and granting rehearing by the panel only, without additional briefing or oral argument. Finally, on March 29, 1983 the panel (again divided) issued its second decision, this time affirming the district court's judgment. Bonnie's petition for rehearing en banc was denied.

BASIS FOR FEDERAL JURISDICTION

Jurisdiction of the district court was invoked on grounds of diversity and under the federal interpleader statute pursuant to 28 U.S.C. §§1332, 1335 and 2361.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals disregards applicable Illinois statutory and decisional law. It is also inconsistent with a decision of the United States Court of Appeals for the Sixth Circuit, in which analogous Michigan law was applied to identical facts. But the case is more than wrongly decided. It also has the effect of undercutting enlightened divorce legislation despite the traditional reservation of that area of law to the states. And it may have even broader ramifications, stripping any court of the ability to order enforceable temporary relief whenever later events render permanent relief unavailable.

I. ILLINOIS LAW RECOGNIZES BROAD EQUITABLE POWERS IN A DIVORCE COURT ACTING TO PRESERVE ITS JURISDICTION, AND ABATEMENT OF A DIVORCE ACTION DOES NOT RENDER ALL THE COURT'S INTERIM ORDERS NULLITIES.

The Court of Appeals' decision to award the life insurance policy proceeds to Ronald's parents relies solely on the abatement of the action for legal separation or divorce between Bonnie and Ronald. The panel majority reasoned that since the underlying action abated upon Ronald's death, the interlocutory order directing Ronald to reinstate Bonnie as beneficiary abated along with it. This reliance on abatement is misplaced. The question presented by this admittedly unusual case is not one of abatement. Instead, the real issue is the effectiveness of the Illinois court's order entered during the pendency of the divorce pro-

ceedings for the purpose of preserving the marital status quo.*

Because the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") requires the court in a divorce action to divide the marital property equitably and provide for the support of a dependent spouse, Ill. Rev. Stat. ch. 40, §§ 503(c),

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* The extent to which the Court of Appeals misunderstood the issue is indicated by its discussion (703 F.2d at 1047) of the value of the marital residence and the rights of Ronald's children by former marriages as factors bearing on the division of the marital estate. These truly are questions that the divorce court did not, and could not, consider because of Ronald's death. The instant lawsuit, however, never sought judicial enforcement of some hypothetical division of marital property. Instead, it sought only to vindicate the rights Bonnie would have enjoyed if Ronald had died before the divorce action was commenced or if, while the divorce action was pending, Ronald had not acted wrongfully.

504 (1979), the property must be preserved in status quo pending trial or settlement. If either of the parties is allowed to transfer or dispose of property subject to the court's jurisdiction, the court loses its ability to provide for support and make a fair distribution. Klajbor v. Klajbor, 398 Ill. 152, 156-57, 75 N.E.2d 353 (1947).

The restraint imposed by the court in the Brieces' suit was a specific response to a specific act that had already threatened the integrity of the proceedings. By changing the beneficiary designation of his life insurance policy, after submitting to the divorce court's jurisdiction, Ronald Briece attempted to defeat his wife's marital interest in the policy and the economic

protection it afforded. Bonnie acted immediately to preserve her rights, using the only forum and the only procedural device available to her under IMDMA -- a petition for temporary relief. Ill. Rev. Stat. ch. 40, § 501 (1979). In response to her petition, the court also acted immediately. It entered the temporary order based on the representations of Ronald Briece's attorney in open court that Ronald had made the beneficiary change and was at the time of the hearing gravely ill.

It has never been suggested that there was any infirmity in the court's order as entered. Indeed, the order was tailored to the emergency: the only possible reason for issuing the temporary injunction commanding immedi-

ate reinstatement, rather than simply setting the matter for full hearing at a later date, was to avoid leaving Bonnie unprotected in the event of the sudden death of Ronald Briece. The effect of the Court of Appeals' decision is to acknowledge the divorce court's statutory power to protect a surviving spouse in the event of death -- and then make that protection illusory.

This result flies in the face of the Illinois Marriage and Dissolution of Marriage Act. Moreover, Illinois courts have long recognized that certain claims arising out of orders for temporary relief in divorce or separate maintenance litigation do not abate on the death of a spouse and are enforceable even if the divorce action itself cannot proceed.

See, e.g., Estate of Schriver, 289 Ill. App. 581, 7 N.E.2d 611 (1937) and Estate of Bell, 210 Ill. App. 350 (1918) (arrearages under temporary support orders may be recovered after death of husband); and Spiro v. Spiro, 124 Ill. App. 2d 254, 260 N.E.2d 332 (1970) (interim order that husband pay wife's attorneys' fees enforceable after death of wife; additional fees to the time of the wife's death to be established on remand). It is hard to understand why an order to pay temporary support or attorneys' fees must be obeyed, while an order to make a beneficiary designation may be ignored. In fact the Illinois authorities suggest that Ronald could not ignore this order. In cases involving final judgments, Illinois courts have not hesitated to

award the proceeds of life insurance policies to those designated as beneficiaries in the judgments. See, e.g. Travelers Insurance Co. v. Daniels, 667 F.2d 572 (7th Cir. 1981); Lincoln National Life Inssurance Co. v. Watson, 71 Ill. App. 3d 900, 390 N.E.2d 506 (1979). Based upon these decisions and the rationale of Candler v. Donaldson, 272 F.2d 374 (6th Cir. 1959) (see Section II below), an Illinois court would invoke the maxim "equity considers that as done which ought to be done" and award the proceeds of the life insurance policy to Bonnie.*

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* In a recent decision, the Illinois Supreme Court cautioned against applying the doctrine of abatement with a broader brush than necessary. See Walter v. Board of Education, 93 Ill. 2d 101, 108, 442 N.E.2d 870 (1982).

Bonnie is not seeking an adjudication as to property rights, future maintenance or dissolution of her marriage. She merely seeks an invocation of the court's general and equitable powers to enforce a valid order for temporary relief incident to her basic action for legal separation or dissolution of marriage. That temporary order was entered specifically to protect Bonnie in the event of Ronald's death. To hold that Bonnie is not entitled to the proceeds of the policy because of the very contingency from which the order was meant to protect her would defeat the intent of the Illinois Marriage and Dissolution of Marriage Act and would work an unconscionable injustice.

II. THE DECISION BELOW IS IN CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The relationship between abatement and a divorce court's temporary order respecting life insurance has been presented to the Court of Appeals for the Sixth Circuit, and that Court concluded (applying Michigan law) that the husband's attempt to defeat the wife's marital rights was effectively nullified by entry of a court order less direct and less specific than the order entered in this case. In Candler v. Donaldson, 272 F.2d 374 (6th Cir. 1959), Mr. Candler removed his wife as beneficiary of his life insurance policy and substituted his mother while divorce proceedings were pending. He did so in the face of general injunctions to maintain his in-

surance policies in force and not to dispose of any property pending the determination of the divorce litigation. Six weeks later, before a final decree was entered, Mr. Candler died.

In an interpleader action, the federal district court found for the mother. The Sixth Circuit reversed. In doing so, the Court acknowledged the general rule that an insured may change the beneficiary designation unless that right is limited by the policy itself. But the Court held that the general rule must yield to the following equities:

1) The policy involved had to be considered by the divorce court in adjudicating the property rights of the parties.

2) The purpose of the divorce court's temporary order was to preserve the status quo between the parties until the final adjudication of property rights could be made.

3) The husband violated the court's order.

4) The new beneficiary, Mr. Candler's mother, had no offsetting equities of her own and was a pure donee beneficiary.

All these equities are as compellingly present in Bonnie's case. The policy on Ronald's life had to be considered by the divorce court in adjudicating the property rights under Section 503 of the Illinois Marriage and Dissolution of Marriage Act. At the time the case was filed -- and for two and a half months thereafter -- Bonnie was the designated beneficiary. The court therefore was acting to preserve the status quo, and to prevent dissipation of marital assets pending an adjudication of support and property rights. Ronald attempted to defeat Bonnie's

marital rights in the policy and then failed to comply with a valid court order directing him to restore Bonnie's rights. Finally, the new beneficiaries, Ronald's parents, have no offsetting equities of their own, especially in light of Bonnie's status as a disabled and dependent spouse.

Candler is, quite plainly, on all fours with this case. The Court of Appeals attempted to distinguish Candler because in that case the husband knew of the restraining order before he defied it. Indeed, a recurring theme in the panel majority's opinion is that Ronald did not personally know of the order in this case. 703 F.2d at 1046, 1047.

The supposed distinction does violence both to Candler and to this case. First, Mr. Candler's willfulness

is not apparent in the Sixth Circuit's opinion. Instead, the Court's initial concern was whether the injunction, which was couched in general terms, even covered Mr. Candler's action. There were no such ambiguities in the Illinois court's directive to Ronald Briece.

Second, and more importantly, Ronald's personal knowledge is a red herring. No evidence was ever offered to demonstrate knowledge or ignorance. Had evidence been offered, it would have been germane only to contempt proceedings, which cannot be brought in this case. The sole question before the Eighth Circuit was the legal effect of the order when it was entered. On that question Ronald's submission to the jurisdiction of the divorce court and his representa-

tion by counsel at all stages of the proceedings -- including the April 28, 1981 proceeding -- are conclusive. In fact, it is an ironical aspect of this case that it was Ronald's attorney who provided the information that necessitated the divorce court's immediate action: she admitted in open court that Ronald had changed the beneficiary designation and confirmed that he was too ill for the court to adopt a wait-and-see attitude. That Ronald may not himself have had knowledge of the court's order is therefore completely irrelevant.

The Court of Appeals also sought to distinguish Candler because Mr. Candler affirmatively violated a prohibitory injunction, while Ronald ignored a mandatory one. This distinction suggests

that a mandatory injunction is entitled to less weight than an injunction couched in negative terms. There is no legal authority to support this suggestion. The only difference between the two varieties of injunction* is that a court in the exercise of its equitable powers has broader discretion to deny a request for a mandatory injunction, because the specific directive may be more burdensome to enforce. Once a court has determined, however, that a mandatory injunction is necessary to preserve the status quo, its order must be obeyed. Deisenroth v. Dodge, 350 Ill. App. 20, 25, 111 N.E.2d 575 (1953). Here the mandatory injunction clearly was necessary: Ronald had

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* Often, the difference is only a matter of phraseology. The court can either direct a party to do X or not to do non-X.

already done the wrongful act and the medical emergency made any delay dangerous.

The Eighth Circuit's distinction of the Candler case was erroneous. There is every reason to believe that an Illinois court would find the Sixth Circuit's decision highly persuasive.*

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* Illinois decisions reflecting the enforceability of interim orders in divorce proceedings, despite the abatement of the divorce action itself, are cited at p. 15 supra. In addition, recent decisions under Illinois law make it clear that the willfulness of the noncompliance is irrelevant. See, e.g., Travelers Insurance Co. v. Daniels, 667 F.2d 572 (7th Cir. 1981), where the court held that the decedent's lack of personal knowledge of the terms of the decree ordering him to name his daughter as beneficiary was irrelevant. 667 F.2d at 576. The court quoted from Couch on Insurance 2d, §63.370 at 91 (1967) as follows:

> "Where the insured is obligated by judicial decree to change

(Continued on next page)

III. THE DECISION BELOW HAMPERS THE STATE COURTS' ABILITY TO IMPLEMENT ILLINOIS DIVORCE LAW, AND MAY HAVE BROADER RAMIFICATIONS FOR EQUITY JURISDICTION IN GENERAL.

Divorce law has always been considered the province of the states, in the exercise of their police and public welfare powers, to regulate. The Illinois Marriage and Dissolution of Mar-

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> the beneficiary under his policy, the law will regard him as having done that which he is obligated to do and will treat the policies as equitably assigned to the persons who should have been named as beneficiaries."

667 F.2d at 576 n. 8. Accord, Lincoln National Life Insurance Co. v. Watson, 71 Ill. App. 3d 900, 390 N.E.2d 506 (1979) (whether decedent made any attempt to comply with requirement in divorce judgment that he make his son beneficiary of a life insurance policy is irrelevant to application of maxim "equity regards as done that which ought to be done").

riage Act, enacted in 1977, followed a national trend of family law legislation which broadened the courts' powers to bring dead marriages to a legal burial with a minimum of gamesmanship, economic disruption and familial acrimony. Marital misconduct was eliminated as a factor in determining issues of support and property division, Ill. Rev. Stat. ch. 40, §§ 503, 504; equity rather than title controlled property divisions, Ill. Rev. Stat. ch. 40, § 503; and broader temporary injunctive powers were added to the courts' arsenal of mechanisms to prevent secretion or dissipation, Ill. Rev. Stat. ch. 40, § 501. The decision below takes away the court's ability to administer this enlightened legislative scheme in any case in which one party dies before the divorce judgment becomes final.

The Eighth Circuit reached this result by assuming that abatement operated to expunge any orders entered in the case before Ronald's death. In giving abatement such an undifferentiated effect, the Court ignored Illinois law and analogous law from Michigan.

It is but a small step from the Eighth Circuit's decision to excusing disobedience of any interim order, so long as the case ultimately becomes moot for any reason or is reversed on appeal. But litigants have never before been encouraged to flout the court's authority and gamble on the ultimate outcome of a case. As Justice Frankfurter remarked more than thirty-five years ago, "Only when a court is so obviously travelling outside its orbit as to be

merely usurping judicial forms and facilities, may [its] order . . . be disobeyed and treated as if it were a letter to a newspaper." United States v. United Mine Workers, 330 U.S. 258, 309-10 (1947) (Frankfurter, J., concurring).

Bonnie Briece is entitled to enforcement of the valid temporary order entered solely to protect her in the event of her husband's death -- the very incident relied upon by the court below in denying enforcement.

CONCLUSION

For the reasons given, petitioners pray that a writ be granted to review the judgment and opinion below.

Respectfully submitted,

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BONNIE J. BRIECE, Appellant,

v.

WILLIAM E. BRIECE and
GLADYS G. BRIECE, Appellees.

No. 82-1104

United States Court of Appeals
Eighth Circuit

Submitted Feb. 22, 1983

Decided March 29, 1983

Before BRIGHT and JOHN R. GIBSON, Circuit Judges, and HARRIS,* Senior District Judge.

JOHN R. GIBSON, Circuit Judge.

Ronald Briece's death led to this interpleader in which his widow and parents make conflicting claims for life insurance proceeds. Shortly before his death, Ronald had removed Bonnie, his

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* Oren Harris, United States Senior District Judge for the Eastern and Western Districts of Arkansas, sitting by designation.

wife, as beneficiary on the policy and substituted his parents, William and Gladys Briece. Bonnie had earlier filed for divorce. Four days before Ronald's death, Bonnie obtained a temporary restraining order directing that Ronald reinstate her as beneficiary. Ronald never knew of the order and did not comply with it. The district court[1] awarded the insurance proceeds to the parents on cross-motions for summary judgment. Bonnie appeals claiming that the temporary restraining order was for the purpose of maintaining the status quo and that the equitable doctrine that considers as done that which ought to be

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[1] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

done requires that she be reinstated as beneficiary. We affirm the judgment of the district court in favor of the parents, William and Gladys Briece.[2]

Ronald Briece was insured under a group term life insurance policy issued to the employer by Connecticut General Life Insurance Company. Bonnie and Ronald had been married for about six and one-half years when Bonnie filed a petition for dissolution of their marriage in the Circuit Court of Cook County, Illinois on January 23, 1981. On April 20, 1981, Ronald removed Bonnie as bene-

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[2] On appeal, this panel reversed the judgment of the district court. Briece v. Briece, No. 82-1104 (8th Cir. Nov. 2, 1982). On February 22, 1983, we granted the parents' petition for rehearing and vacated the earlier panel decision. After reconsideration, we now affirm the district court judgment.

ficiary under the insurance policy and designated his parents as the new beneficiaries.

At a hearing in the divorce action on April 28, 1981, Bonnie learned of this change and also learned that Ronald was dying of lung cancer. Bonnie obtained from the circuit court an order directing Ronald to reinstate her as beneficiary. The court further ordered Ronald to maintain Bonnie as beneficiary until further order of the court, or until ten days from the date of the order.

Ronald died four days later without complying with the order. He was never personally aware of the order, although his attorney was present at the time it was entered.

Ronald's parents filed this action against Connecticut General to recover death benefits under the insurance policy. Upon motion of Connecticut General, the district court added Bonnie as party defendant and ordered interpleader.

The district court, in granting summary judgment in favor of Ronald's parents, held that under Illinois law the divorce action, and with it the interlocutory order of April 28, abated upon Ronald's death. The court further found that Ronald lawfully exercised his right to change the beneficiary designation under his life insurance policy and that there were no equities in Bonnie's favor to invalidate the change.

We affirm primarily for the reasons expressed by the district court.

In Illinois, an action for divorce abates upon the death of one of the parties prior to entry of a final decree of divorce. Bushnell v. Cooper, 289 Ill. 260, 124 N.E. 521 (1919); Howard v. Howard, 49 Ill. App. 3d 441, 7 Ill. Dec. 303, 364 N.E. 2d 464 (1977). The Illinois Supreme Court has reasoned that "death settle[s] the question of separation beyond all controversy," and deprives the court of jurisdiction over the matter. Bushnell v. Cooper, 289 Ill. at 264, 124 N.E. at 522.

During the dissolution proceeding in In re Estate of Chandler, 90 Ill. App. 3d 674, 46 Ill. Dec. 46, 413 N.E. 2d 486 (1980), the husband withdrew funds

from a savings account held jointly with his wife and deposited the funds in a new account held jointly with his brother. The husband also changed the beneficiary under a trust account by crossing out the name of his wife and substituting the name of his brother one day prior to being served with an injunction preventing the transfer or dissipation of marital assets. The husband died before final judgment was entered in the divorce proceeding. The trial court awarded the wife half of the funds in each account as "marital property". The appellate court held that it was error to award the funds as marital property because the divorce action abated upon the husband's death, but the court upheld the

award of half the joint savings on another ground.[3]

As in Chandler, the divorce action between Ronald and Bonnie abated upon Ronald's death. That Chandler involved an injunction preventing transfer of property, and this case involves a temporary restraining order ordering reinstatement of Bonnie as beneficiary is not significant. Following Chandler, we conclude that the temporary restraining order abated along with the divorce action upon Ronald's death. Cf. Dietz v. Van Speybroeck, 225 Ill. App. 133 (1922) (a docket entry awarding the wife

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[3] The presumption that either party to a joint savings account can withdraw the funds without liability to the other party was rebutted by evidence that both spouses contributed to the account and intended to share the property equally during the marriage. 413 N.E. 2d at 490.

certain real estate in a divorce proceeding had no effect since the wife died before entry of a formal decree awarding her property).

Bonnie argues that the purpose of the temporary restraining order was to preserve the status quo. Under the circumstances of this case, however, with the death of Ronald only four days later, to so recognize the temporary restraining order would be to give it the effect of a final distribution of marital property. By its own terms it was to be in effect only until further order of the court or until ten days from the date of its entry. Had Ronald lived, disposition of all the marital property would have been determined in the divorce action. The court would

have considered the marital residence and, conceivably, the respective rights to the property of Bonnie, who was Ronald's third wife and had been disabled in an automobile accident, and of the four children surviving Ronald by other marriages, who were grandchildren of appellees. The temporary restraining order should not be recognized as doing what the death of Ronald prevented the Illinois Circuit Court from doing in a final decree.

Bonnie argues that the equitable maxim "equity considers as done that which ought to be done" applies. We cannot conclude that the district court erred when it held that the maxim was inapplicable. When Ronald changed the beneficiary designation on his life

insurance policy, he did so pursuant to the terms of the policy, and he was not violating any order of the court when he did so. Ronald never personally knew about the temporary restraining order which abated upon his death four days after it was entered.

Bonnie relies upon cases which are distinguishable because they involved not only knowledge of a restraining order but defiance of it. See Candler v. Donaldson, 272 F.2d 374 (6th Cir. 1959); Webb v. Webb, 375 Mich. 624, 134 N.W. 2d 673 (1965). Other cases involved final divorce decrees and abatement was not an isue. See Travelers Insurance Co. v. Daniels, 667 F.2d 572 (7th Cir. 1981); Lincoln National Life Insurance Co. v. Watson, 71 Ill. App. 3d 900, 28 Ill.

Dec. 839, 390 N.E. 2d 506 (1979). Bonnie does not contend that she obtained a vested interest in the insurance policy by virtue of a prior oral contract or property settlement agreement. See Thomson v. Thomson, 156 F.2d 581 (8th Cir.), cert. denied, 329 U.S. 793, 67 S.Ct. 370, 91 L.Ed. 679 (1946) (oral contract gave wife vested interest in husband's insurance policy, abatement not in issue because parties made contract four years prior to filing of divorce action and because court granted divorce decree); Glover v. Metropolitan Life Insurance Co., 664 F.2d 1101 (8th Cir. 1981) (property settlement agreement gave wife vested interest in husband's insurance policy, abatement not in issue because court granted divorce decree). Cf. In

re Estate of Chandler, 90 Ill. App. 3d 674, 46 Ill. Dec. 46, 413 N.E. 2d 486 (1980) (husband could not withdraw all funds from savings account held jointly with his wife because evidence showed that both spouses contributed to the account and intended to share the property equally during the marriage).

Bonnie claims the proceeds because of her status as prior beneficiary, but this does not confer upon her a vested property interest or right. When the insured reserves the right to change a beneficiary, as Ronald did, the beneficiary has a mere expectancy during the insured's lifetime. O'Toole v. Central Laborers' Pension & Welfare Funds, 12 Ill. App. 3d 995, 299 N.E. 2d 392 (1973).

The judgment of the district court is affirmed.

OREN HARRIS, Senior District Judge, dissenting.

I respectfully dissent and would reverse for the reasons set forth herein.

Under the Illinois Marriage and Dissolution of Marriage Act, a life insurance policy is marital property subject to disposition by the divorce court in a divorce proceeding. In Re: Marriage of Smith, 84 Ill. App. 3d 446, 39 Ill. Dec. 905, 405 N.E. 2d 884 (3d Dist. 1980); In Re: Marriage of Hunt, 78 Ill. App. 3d 653, 34 Ill. Dec. 55, 397 N.E. 2d 511 (1979). Also, under Ill. Rev. Stat. ch. 40, § 501(a) (1979), it is within the rights of a party to a

divorce proceeding to petition the court for a temporary injunction to restrain a person from transferring or disposing of marital property, or for other proper injunctive relief. Presumably, pursuant to this statutory authority, Bonnie sought a temporary restraining order against her husband, Ronald. Within the scope of its power under § 501(a), the circuit court properly granted temporary restraining order, requiring that the status quo of the marital property be maintained. As noted by the appellant's attorney, the temporary restraining order was never intended to distribute property or to determine the title to the insurance policy proceeds. Rather, it was the proper exercise of the Court's power to maintain the "status quo."

The appellant argues that the order for temporary relief should be no less enforceable than beneficiary designations embodied in final decrees of divorce. She cites several cases for the proposition that Illinois courts have not hesitated to invoke equitable powers to enforce beneficiary designations incorporated in final judgments for dissolution of marriage. In each of the cases cited the court invoked its equitable powers to enforce its orders when not obeyed. The appellant asserts these cases command the same result when a temporary order is entered without a final decision having been reached as to the divorce. The district court distinguished the present case from those cited

by the appellant due to the lack of a final judgment of divorce.

It is my opinion that the decision of the district court is misplaced. Rather, the question should be resolved by the equitable maxim "equity considers as done that which ought to be done." As the appellant correctly states, the real issue is with the effectiveness of the order of the Illinois court. The district court held that the equitable principle had no application in the case because no final decree of divorce had been entered and no property settlement had been made. According to the district court, until this had been done, it could not apply equity to resolve the dispute. It is my opinion that once the Illinois Circuit Court ordered that Bonnie be

reinstated as beneficiary of the life insurance policy, the equitable principle of "equity considers as done that which ought to be done" took over. Therefore, from the date of April 28, 1981, the appellant is assumed to be the beneficiary of the life insurance policy. This is true even though Ronald died before entry of a final decree of divorce.

In the case of Travelers Insurance Company v. Daniels, 667 F.2d 572 (7th Cir. 1981), the Seventh Circuit applied Illinois law to a similar case and reached a similar result. The appellant, Travelers, brought a statutory interpleader action to determine the beneficiaries of a life insurance policy. Ruth Daniels (second wife of the deceased) and Hattie Hunter were the named

beneficiaries. Kaye Daniels (the first wife of the deceased) and Kendall Daniels (daughter of Fred and Kaye's marriage) claimed that Kendall was entitled to the proceeds. In the divorce decree of Fred and Kaye Daniels, Fred was ordered to maintain a life insurance policy on his life for Kendall as the irrevocable beneficiary during her minority. The district court in Illinois entered a summary judgment in favor of Ruth Daniels and Hattie Hunter. On appeal, the Seventh Circuit reversed and held that Kendall Daniels was entitled to the proceeds as the beneficiary of the policy.

In Travelers, the final decree of divorce directed Fred Daniels to "maintain in full force and effect, all existing life insurance policies which

he has on his life, and designate Kendall Lynnice Daniels, minor child of the parties, as the irrevocable beneficiary during her minority." When Fred married Ruth Daniels, he attempted to change the beneficiary to Ruth Daniels and Hattie Hunter, who were still the designated beneficiaries when Fred died.

The Seventh Circuit, citing Illinois case law, held, as a general rule, that the named beneficiary of a life insurance policy obtains a vested interest to the proceeds upon the death of the insured. Bank of Lyons v. Schultz, 22 Ill. App. 3d 410, 318 N.E. 2d 52, 57. There is an exception, however, created by Illinois courts to the named beneficiary rule when someone else has acquired an equitable right to be treated as the

beneficiary. The Seventh Circuit cited Lincoln National Life Insurance Company v. Watson, 71 Ill. App. 3d 900, 28 Ill. Dec. 339, 390 N.E. 2d 506 (1979), and others, for the proposition "that when a divorce decree orders a party to name his children as beneficiaries of a life insurance policy, those children are entitled to receive the proceeds even if they were not the named beneficiary at the time of that party's death." 667 F.2d at 573. In Travelers and Lincoln, it made no difference that the court-ordered beneficiary was never named by the insured as beneficiary. Both cases applied the equitable maxim "equity considers as done that which ought to be done." Application of this maxim led to the finding that beneficiaries designated

by court decrees were held to be the proper beneficiaries by the courts.

It is true that the above cited cases dealt with final decrees of divorce, while in this case death intervened before a final decree could be entered. I find no decision by an Illinois court on this precise issue, and am of the opinion that the principle and rules enunciated in Travelers and Lincoln should apply in this case.

The Illinois Circuit Court for Cook County entered an order for the purpose of preserving the marital property and protecting the rights of the spouse during the pending divorce proceeding. The trial courts in Travelers and Lincoln entered similar orders to protect minor children and their inter-

ests. In all cases, the divorce courts exercised their proper authority to protect interested parties to a divorce proceeding and preserve the marital property. I do not find the absence of a final decree to be important; a valid court order was entered and it is entitled to enforcement. During the pendency of the divorce proceeding, and before Ronald Briece's death, the court entered an order designed to preserve the marital property for the protection of Bonnie Briece. This was proper.

Although Illinois law is applicable and Ill. Rev. Stat. Ch. 40 (1979), provides for protection of spouses and their children, other jurisdictions have established such procedures for the protection of spouses and minor children.

In Candler v. Donaldson, 272 F.2d 374, 377, the Sixth Circuit, construing Michigan law on same circumstances and conditions as in the instant case, reversed the district court and held: "We are of the opinion that the order restraining the insured from 'otherwise disposing of the property hereinabove mentioned' (emphasis added) prohibited the insured from changing the beneficiary from his wife until such final order was made." "Equity considers that as done which ought to be done." Thomson v. Thomson, 8 Cir., 156 F.2d 581, 586, certiorari denied 329 U.S. 793, 67 S.Ct. 370, 91 L.Ed. 679, rehearing denied 329 U.S. 833, 67 S.Ct. 501, 91 L.Ed. 706.

In Thomson, supra, the Eighth Circuit applied the same equitable rule in the case identical to the facts in the instant case. There the insured obtained an insurance policy from John Hancock Mutual Life Insurance Company and named Caroline Thomson, the then wife of the insured, as beneficiary. The policy contained a provision that the right to change beneficiary was reserved to the insured. However, she had acquired a vested interest in the proceeds. Subsequently, there was a separation and a divorce proceeding. Thomson proposed to change the beneficiary to his estate. The divorce proceeding was brought in Waukegan, Illinois. There was a contract and settlement entered into in connection with the proceeding.

Before final decree in the case, Thomson died. In the meantime he had proposed to change the beneficiary to the estate in order to obtain a loan from a bank. An interpleader was filed similar to the interpleader in this case. The district court held that the insured had a right to change the beneficiary. The Eighth Circuit reversed the district court and applied the rule that "equity will consider as done that which should have been done." Crowell v. Northwestern Nat. Life Insurance Co., 140 Iowa 258, 118 N.W. 412; Jordan v. Roden, 6 Cir., 292 F. 573.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 82-1104

Bonnie J. Briece,	*	
	*	
Appellant,	*	Appeal from the
	*	United States
v.	*	District Court
	*	for the Western
William E. Briece and	*	District of
Gladys G. Briece,	*	Missouri.
	*	
Appellees.	*	

Submitted: May 19, 1982

Filed: November 2, 1982

Before, BRIGHT and JOHN R. GIBSON, Circuit Judges, and HARRIS,* Senior District Judge.

HARRIS, Senior District Judge.

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* Oren Harris, Senior District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

This is an appeal from a judgment of the United States District Court for the Western District of Missouri, Western Division.[1] The lower court determined that the appellees, William E. Briece and Gladys G. Briece, parents of Ronald A. Briece, deceased, were beneficiaries of the decedent's life insurance policy and thus entitled to the proceeds. The appellant, Bonnie J. Briece, appeals the decision of the district court and claims that she is the beneficiary of the life insurance policy and is entitled to the proceeds. Based on the record, we are constrained to reverse for the following reasons.

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[1] The Honorable Scott O. Wright, Chief Judge.

Statement of Facts.

The appellant, Bonnie J. Briece, and the deceased were married for a period of six and one-half years. Ronald Briece, through his employer, Loctite Corporation, was insured under a group term life insurance policy issued by Connecticut General Life Insurance Company (Connecticut General), an intervenor in the lower court case. As his wife, Bonnie was the designated beneficiary under the policy.

On January 23, 1981, Bonnie filed a petition for divorce in the Circuit Court of Cook County, Illinois, in which she sought an equitable division of the marital property. On April 20, 1981, Ronald removed Bonnie as beneficiary of his life insurance policy and

designated his parents, William E. and Gladys G. Briece, as the new beneficiaries. Pursuant to the divorce proceeding, and as provided by Illinois law, Bonnie sought an injunction from the circuit court to enjoin Ronald from removing her as the beneficiary. After a hearing on April 28, 1981, with both Bonnie and Ronald represented by counsel, an order was entered by the Illinois Circuit Court directing Ronald to reinstate Bonnie as the beneficiary of the life insurance policy. It further ordered Ronald to maintain Bonnie as the beneficiary until further order of the court, or until 10 days from the date of the order.

Ronald was at this time gravely ill. On May 2, 1981, he died without

having complied with the order of the Cook County Circuit Court. After Ronald's death his parents brought this action in the Western District of Missouri against Connecticut General to compel the payment of the death benefits under the insurance policy. Bonnie had also filed a claim with Connecticut General for the benefits. Connecticut General refused to pay the proceeds to the parents, and filed a counterclaim for interpleader. It also joined Bonnie Briece as a party to the action. The parties filed cross-motions for summary judgment.

The district court, after a hearing, decided for the appellees and concluded the parents were the beneficiaries of the insurance and entitled to the proceeds. In its opinion dated

December 23, 1981, the district court opined that Ronald Briece had properly exercised his contractual right to change the beneficiary of the life insurance policy and to name a new beneficiary. It concluded that the temporary restraining order entered on April 23, 1981, by the Cook County Circuit Court directing that Ronald Briece rename Bonnie Briece as the beneficiary was ineffective because it abated, along with the divorce action, upon the death of Ronald Briece. It is from this judgment that the appellant, alleging error, brings this action.

Opinion.

In her appeal, Bonnie asserts four contentions as error in the district court's ruling. The appellant premises her argument as follows: (1) Under

Illinois law a spouse may petition the court for support and to prevent the dissipation of marital property during the process of dissolution of marriage; (2) the Illinois court properly ordered a return to the status quo pending the determination of marital rights; (3) the order for temporary relief should be no less enforceable than beneficiary designations embodied in divorce judgments; and (4) the reinstatement of Bonnie Briece as sole beneficiary of the policy was accomplished by the order because "equity considers as done that which ought to be done."

The district court found that the insured under a life insurance policy has a contractual right to change the beneficiary of the life insurance policy

as he chooses. Further, the district court held that upon the death of one of the parties to a divorce proceeding in Illinois an action for divorce abates if no final decree of divorce has been entered. Therefore, the divorce proceeding between Ronald and Bonnie abated upon the death of Ronald as the court had reached no final decision. Hence, the Illinois court was without jurisdiction after Ronald's death. The order of April 28, 1981, had no further force and effect. The equitable principle that "equity considers as done that which ought to be done" was held to be without force and effect by the district court because no final decree of divorce had been entered and no property settlement had been made. All cases cited by

the appellant had to do with final divorce decrees.

The district court discounted Bonnie's arguments on the basis of equity. The beneficiary change occurred before the temporary restraining order was entered by the circuit court on April 28, 1981. In the cases cited by the appellant, the failure to comply with the court's order occurred following the entry of final order, including directive to the insured before his death to change the beneficiary of the policy. Since the divorce action abated upon the death of Ronald, the district court decided that the beneficiary change by Ronald to his parents should be sustained.

For the reasons discussed below, we reverse.

In the opinion of this Court the district court incorrectly applied the law of Illinois to this case under the circumstances.

Under the Illinois Marriage and Dissolution of Marriage Act, a life insurance policy is marital property subject to disposition by the divorce court in a divorce proceeding. In Re: Marriage of Smith, 84 Ill. App. 3d 446, 405 N.E.2d 884 (3d Dist. 1980); In Re: Marriage of Hunt, 78 Ill. App. 3d 653, 397 N.E.2d 511 (1979). Also, under Ill. Rev. Stat. ch 40, § 501(a) (1979), it is within the rights of a party to a divorce proceeding to petition the court for a temporary injunction to restrain a person from transferring or disposing of marital property, or for other proper injunctive

relief. Presumably, pursuant to this statutory authority, Bonnie sought a temporary restraining order against her husband, Ronald. Within the scope of its power under § 501(a), the circuit court properly granted a temporary restraining order, requiring that the status quo of the marital property be maintained. As noted by the appellant's attorney, the temporary restraining order was never intended to distribute property or to determine the title to the insurance policy proceeds. Rather, it was the proper exercise of the court's power to maintain the "status quo."

The appellant argues that the order for temporary relief should be no less enforceable than beneficiary designations embodied in final decrees of

divorce. She cites several cases for the proposition that Illinois courts have not hesitated to invoke equitable powers to enforce beneficiary designations incorporated in final judgments for dissolution of marriage. In each of the cases cited the court invoked its equitable powers to enforce its orders when not obeyed. The appellant asserts these cases command the same result when a temporary order is entered without a final decision having been reached as to the divorce. The district court distinguished the present case from those cited by the appellant due to the lack of a final judgment of divorce.

It is the opinion of this Court that the decision of the district court is misplaced. Rather, the question

should be resolved by the equitable maxim "equity considers as done that which ought to be done." As the appellant correctly states, the real issue is with the effectiveness of the order of the Illinois court. The district court held that the equitable principle had no application in the case because no final decree of divorce had been entered and no property settlement had been made. According to the district court, until this had been done, it could not apply equity to resolve the dispute. It is our opinion that once the Illinois Circuit Court ordered that Bonnie be reinstated as beneficiary of the life insurance policy, the equitable principle of "equity considers as done that which ought to be done" took over. Therefore,

from the date of April 28, 1981, the appellant is assumed to be the beneficiary of the life insurance policy. This is true even though Ronald died before entry of a final decree of divorce.

In the case of Travelers Insurance Company v. Daniels, 667 F.2d 572 (7th Cir. 1981), the Seventh Circuit applied Illinois law to a similar case and reached a similar result. The appellant, Travelers, brought a statutory interpleader action to determine the beneficiaries of a life insurance policy. Fred Daniels owned the policy. Ruth Daniels (second wife of the deceased) and Hattie Hunter were the named beneficiaries. Kaye Daniels (the first wife of the deceased) and Kendall Daniels (daughter of Fred and Kaye's marriage)

claimed that Kendall was entitled to the proceeds. In the divorce decree of Fred and Kaye Daniels, Fred was ordered to maintain a life insurance policy on his life for Kendall as the irrevocable beneficiary during her minority. The district court in Illinois entered summary judgment in favor of Ruth Daniels and Hattie Hunter. On appeal, the Seventh Circuit reversed and held that Kendall Daniels was entitled to the proceeds as the beneficiary of the policy.

In Travelers, the final decree of divorce directed Fred Daniels to "maintain in full force and effect, all existing life insurance policies which he has on his life, and designate Kendall Lynnice Daniels, minor child of the parties, as the irrevocable beneficiary

during her minority." When Fred married Ruth Daniels, he attempted to change the beneficiary to Ruth Daniels and Hattie Hunter, who were still the designated beneficiaries when Fred died.

The Seventh Circuit, citing Illinois case law, held, as a general rule, that the named beneficiary of a life insurance policy obtains a vested interest to the proceeds upon the death of the insured. Bank of Lyons v. Schultz, 22 Ill. App. 3d 410, 318 N.E. 2d 52, 57. There is an exception, however, created by Illinois courts to the named beneficiary rule when someone else has acquired an equitable right to be treated as the beneficiary. The Seventh Circuit cited Lincoln National Life Insurance Company v. Watson, 71 Ill. App. 3d 900, 390

N.E. 2d 506 (1979), and others, for the proposition "that when a divorce decree orders a party to name his children as beneficiaries of a life insurance policy, those children are entitled to receive the proceeds even if they were not the named beneficiary at the time of that party's death." 667 F.2d at 573. In Travelers and Lincoln, it made no difference that the court-ordered beneficiary was never named by the insured as beneficiary. Both cases applied the equitable maxim "equity considers as done that which ought to be done." Application of this maxim led to the finding that beneficiaries designed by court decrees were held to be the proper beneficiaries by the courts.

It is true that the above cited cases dealt with final decrees of divorce, while in this case death intervened before a final decree could be entered. The Court finds no decision by an Illinois court on this precise issue. This Court is of the opinion that the principle and rules enunciated in Travelers and Lincoln should apply in this case.

The Illinois Circuit Court for Cook County entered an order for the purpose of preserving the marital property and protecting the rights of the spouse during the pending divorce proceeding. The trial courts in Travelers and Lincoln entered similar orders to protect minor children and their interests. In all cases, the divorce courts

exercised their proper authority to protect interested parties to a divorce proceeding and preserve the marital property. We do not find the absence of a final decree to be important; a valid court order was entered and it is entitled to enforcement. During the pendency of the divorce proceeding, and before Ronald Briece's death, the court entered an order designed to preserve the marital property for the protection of Bonnie Briece. This was proper.[2]

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[2] On January 23, 1981, Bonnie filed the aforementioned Petition in the Circuit Court of Cook County, Illinois. She alleged in her Petition that Ronald had left their home in Schaumburg, Illinois and was living in Kansas City, Kansas. She sought, among other things, an equitable division of the parties' marital property, temporary and permanent maintenance, and payment of her medical expenses not covered by her health insurance.

(Continued on next page)

Although Illinois law is applicable and Ill. Rev. Stat., ch. 40 (1979), provides for protection of spouses and their children, other jurisdictions have established such procedures for the protection of spouses and minor children.

(Continued from previous page)
Ronald was employed at the time of his death by the Loctite Corporation. As a Loctite employee, Ronald was insured under a group term life insurance policy (the "policy") issued by Connecticut General. Bonnie was the designated beneficiary under the policy.

After she had filed her Petition, Bonnie learned that her husband was suffering from lung cancer, and that he had been hospitalized. Because of her precarious financial position, Bonnie became concerned about her status as beneficiary of Ronald's life insurance policy. She sought the help of the Circuit Court of Cook County in protecting her marital rights. On April 28, 1981, attorneys for Bonnie and Ronald appeared before Judge Robert C. Buckley, the temporary motion judge in the Domestic Relations Division of the Circuit Court of Cook County, pursuant to Bonnie's petition

(Continued on next page)

In Candler v. Donaldson, 272 F.2d 374, 377, the Sixth Circuit, construing Michigan law on same circumstances and conditions as in the instant case, reversed the district court and held: "We are of the opinion that the

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(Continued from previous page)
for injunctive relief. Bonnie learned that her husband was, indeed, gravely ill, and furthermore, that on April 20, 1981, Ronald has substituted his parents as beneficiaries of the policy.

An order was entered then and there directing Ronald to:

> reinstate Petitioner as the beneficiary of the life insurance policy having a face value and coverage of $78,000 (sic) and to maintain Petitioner as said beneficiary until further order of the court or until 10 days from the date of the entry of this order. (See Affidavit in Support of Plaintiffs Motion for Summary Judgment, Exhibit B).

Four days after the order was entered, on May 2, 1981, Ronald Briece died having failed to comply with its directive.

order restraining the insured from 'otherwise disposing of the property hereinabove mentioned' (emphasis added) prohibited the insured from changing the beneficiary from his wife until such final order was made." "Equity considers that as done which ought to be done." Thomson v. Thomson, 8 Cir., 156 F.2d 581, 586, certiorari denied 329 U.S. 793, 67 S.Ct. 370, rehearing denied 329 U.S. 833, 67 S.Ct. 501.

In Thomson, supra, the Eighth Circuit applied the same equitable rule in the case identical to the facts in the instant case. There the insured obtained an insurance policy from John Hancock Mutual Life Insurance Company and named Caroline Thomson, the then wife of the insured, as benefi-

ciary. The policy contained a provision that the right to change beneficiary was reserved to the insured. However, she had acquired a vested interest in the proceeds. Subsequently, there was a separation and a divorce proceeding. Thomson proposed to change the beneficiary to his estate. The divorce proceeding was brought in Waukegan, Illinois. There was a contract and settlement entered into in connection with the proceeding.

Before final decree in the case, Thomson died. In the meantime he had proposed to change the beneficiary to the estate in order to obtain a loan from a bank. An interpleader was filed similar

to the interpleader in this case. The district court held that the insured had a right to change the beneficiary. The Eighth Circuit reversed the district court and applied the rule that "equity will consider as done that which should have been done." Crowell v. Northwestern Nat. Life Insurance Co., 140 Iowa 258, 118 N.W. 412; Jordan v. Roden, 6 Cir. 292 F. 573.

The judgment of the district is reversed and the case is remanded with direction to the district court to enter summary judgment for Bonnie Briece.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent and would affirm for the reasons

set forth in the Order and Memorandum of the district court.

The net effect of the majority opinion is to recognize the temporary restraining order as a final distribution of marital property. The temporary restraining order entered April 28, 1981, was to be in effect until further order of the court or until ten days from the date of its entry. A hearing was set for May 8, 1981.

Four days after entry of the temporary restraining order, Ronald Briece died. Under Illinois law, an action for divorce abates upon the death of one of the parties before entry of the final judgment. Bushnell v. Cooper, 289 Ill. 260,

124 N.E. 521 (1919); In re Estate of Chandler, 90 Ill. App. 3d 674, 413 N.E.2d 486 (1980). The district court, in my view, correctly ruled that the order of April 28 had "no further force or effect" after Ronald's death.

Had Ronald lived, disposition of all of the martial property would have been determined in the divorce action. The court would have considered the marital residence and, conceivably, the respective rights to the property of Bonnie, who was Ronald's third wife and had been disabled in an automobile accident, and the rights of the four children surviving Ronald by other marriages, who were grandchildren

of appellees. The temporary restraining order should not be recognized as doing what the death of Ronald prevented the Illinois Circuit Court from doing in a final decree.

The district court's opinion recognizes that Ronald "was never personally aware of [the] order" although his attorney of record was. The cases relied upon by the majority involve not only knowledge of the order but defiance of it. In both Travelers Insurance Co. v. Daniels, 667 F.2d 572 (7th Cir. 1981), and Lincoln National Life Insurance Co. v. Watson, 71 Ill. App. 3d 900, 390 N.E. 2d 506 (1979), there was a final divorce decree and the beneficiary of the

life insurance policy was changed in direct violation of the final decree. Chandler v. Donaldson, 272 F.2d 374 (6th Cir. 1959), involved a divorce action in which the insured party was ordered to continue all life insurance policies in effect and restrained from disposing of the parties' property until a final adjudication was made; the insured violated the court order by changing the beneficiary designation of his insurance policy. Chandler also involved the application of Michigan law, under which an action for divorce does not abate with the death of one of the parties. Webb v. Webb, 375 Mich. 624, 134 N.E.2d 673 (1965).

In Thomson v. Thomson, 156 F.2d 581 (8th Cir.), cert. denied, 329 U.S. 793 (1946), reh'g denied, 329 U.S. 833 (1947), the rights to the policy were established by a number of oral and written statements in which the deceased agreed that his former wife should have the life insurance proceeds as payment for her services to the family business. The change in designation of beneficiary occurred four years before the divorce, with an assignment to a bank as collateral for its loan to the deceased. Thomson allowed the former wife to obtain only the proceeds of the policy in excess of

those received by the bank to pay the balance of the loan.

These decisions relied upon by the majority do not establish that the equitable principle of considering "that as done which ought to be done" is applicable under the circumstances of this case, where Ronald changed the beneficiary before the temporary restraining order was entered, where he never knew about the order during the remaining four days of his life,

and where the divorce action under the law of Illinois abates upon death.

A true copy.

Attest:

CLERK, U. S. COURT
OF APPEALS, EIGHT
CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1104	)	September Term 1982
William E. Briece and Gladys G. Briece, Appellees,	)	
vs.	)	
Connecticut General Life Insurance Co.,	)	Appeal from the United States District Court for the Western District of Missouri
vs.	)	
Bonnie J. Briece, Appellant.	)	

The Court, having considered appellees' petition for rehearing and suggestions for rehearing en banc, and appellant's response thereto, and being now fully advised in the premises, hereby orders petition for rehearing and suggestions for rehearing en banc denied.

February 18, 1983

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1104	)	September Term 1982
William E. Briece and Gladys G. Briece,	)	
Appellees,	)	
vs.	)	
Connecticut General Life Insurance Co.,	)	Appeal from the United States District Court for the Western District of Missouri
vs.	)	
Bonnie J. Briece,	)	
Appellant.	)	

The order of the Court entered February 18, 1983, denying petition for rehearing with suggestions for rehearing en banc is withdrawn and the following order below substituted therefor:

The petition for rehearing is granted by the majority of the panel consisting of the Honorable Myron H.

Bright and the Honorable John R. Gibson, Circuit Judges, and the Honorable Oren Harris,* Senior District Judge. Rehearing by the panel will be without oral argument. Judge Harris dissents in this order granting rehearing by the panel which vacates the prior opinion of the Court dated November 2, 1982.

February 22, 1983

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* Oren Harris, Senior District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1104-WM	)	September Term 1982
William E. Briece and Gladys G. Briece,	)	
Appellees,	)	
vs.	)	
Connecticut General Life Insurance Co.,	)	Appeal from the United States District Court for the Western District of Missouri
vs.	)	
Bonnie J. Briece,	)	
Appellant.	)	

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

May 3, 1983.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WILLIAM E. BRIECE and GLADYS G. BRIECE, Plaintiffs,	)	
vs.	)	No. 81-0584-CV-W-5
CONNECTICUT GENERAL LIFE INSURANCE COMPANY, et al., Defendants.	)	

ORDER AND MEMORANDUM

Plaintiffs bring this diversity action against defendant Connecticut General Life Insurance Company, to recover death benefits of $92,000 payable pursuant to a life insurance policy issued by defendant. The plaintiffs, William and Gladys Briece, are the parents of the insured, and they were the named beneficiaries of the life insurance policy at the time of the insured's death. The

defendant insurance company filed a counterclaim for interpleader and added defendant Bonnie Briece as a party to this action. Bonnie Briece is the widow of the insured, and she also claims the proceeds of the life insurance policy. The facts are not in dispute, and all of the parties have filed cross-motions for summary judgment. For the reasons stated, the plaintiffs' motion for summary judgment is sustained, and defendant Bonnie Briece's motion for summary judgment is denied. Defendant Connecticut General Life Insurance Company's motion for summary judgment on its counterclaim for interpleader and attorneys' fees is sustained in part and denied in part.

A. Statement of Facts

Plaintiffs were the parents of Ronald A. Briece who died on May 2, 1981, of lung cancer at the age of 49. At the time of his death, the deceased was the respondent in a dissolution of marriage proceeding which had been initiated in Chicago several months earlier by defendant Briece, his estranged third wife, to whom he had been married for approximately six years. There were no children by their marriage.

As an employee of the Loctite Corporation, the deceased was insured under a group term life insurance policy. The proceeds of this policy is the subject matter of this controversy.

Prior to April 20, 1981, the designated beneficiary under this policy

was defendant Briece. However, on April 20, 1981, twelve days before his death, the insured exercised his right to change his beneficiary under the policy and designated his parents, the plaintiffs, as the beneficiaries.

After learning of this change, defendant Briece procured on April 28, 1981 from the Chicago court where her dissolution of marriage proceeding was pending, a temporary restraining order which in part directed the insured:

> to reinstate Petitioner as the beneficiary of the life insurance policy having a face value and coverage of $78,000 and to maintain Petitioner as said beneficiary until further order of this Court or until 10 days from the date of the entry of this order.

The insured died four days after this order was entered, and he was never per-

sonally aware of this order, although his attorney of record was present at the time it was entered. Subsequent to his death, both the plaintiffs and the defendant Briece demanded payment of the proceeds from the life insurance policy. The plaintiffs claim the proceeds because of the beneficiary change effected on April 20, 1981, and defendant Briece claims the proceeds because of her status as the prior beneficiary and because of the interlocutory order of April 28 directing her reinstatement.

B. Plaintiffs' Motion for Summary Judgment

The only question presented is whether the divorce action, and with it the interlocutory order of April 28, was abated because of the death of the insured. The law in Illinois is clear. An action

for divorce abates upon the death of one of the parties before entry of a final decree. See Bushnell v. Cooper, 289 Ill. 260, 124 N.E. 521 (1919); In the Matter of the Estate of Chandler, 90 Ill. App. 3d 674, 413 N.E.2d 486 (1980); Howard v. Howard, 49 Ill. App. 3d 441, 364 N.E.2d 464 (1977); Dietz v. Van Speybroeck, 225 Ill. App. 133 (1922). The divorce action between defendant Briece and the deceased abated upon his death, and the Illinois court was without jurisdiction from that point on. Therefore, the interlocutory order of April 28 has no further force or effect.

The defendant Briece argues that the proceeds of the life insurance policy is marital property under the Illinois Marriage and Dissolution of Marriage Act, Ill. Rev. Stat. ch. 40,

§§ 101 et. seq. (effective October 1, 1977), and as such, she is entitled to it under the equitable maxim "equity considers that as done which ought to be done." This equitable principal has no application here because no final divorce decree was entered and no property settlement was made. The cases cited in support of defendant's argument all involve a final divorce decree or property settlement which required the spouse to maintain a life insurance policy for the benefit of the other spouse. This is not the case here.

Furthermore, the question whether or not the proceeds of a group term life insurance policy is marital property under the Illinois Act is irrelevant because until a final divorce decree is entered, the Illinois courts have no

jurisdiction to settle marital property disputes under this Act. In the Matter of the Estate of Chandler, supra. Because the death of the insured abated the divorce action, there is no authority to determine what is or is not marital property in this instance, and therefore, defendant Briece is not entitled to the life insurance proceeds under a marital property theory.

If she recovers the proceeds at all, it must be on the theory that the deceased had no right to change the designated beneficiary of his life insurance policy. The facts and the law do not support this theory. Under the terms of the policy, the insured had the right to change beneficiaries by merely filing a written request to do so, and the consent of the present beneficiary was not

required. The Illinois courts have held that when the insured reserves a right to change a beneficiary, the beneficiary has a mere expectancy during the insured's lifetime. O'Toole v. Central Laborers Pension & Welfare Funds, 12 Ill. App. 3d 995, 299 N.E.2d 392 (1973). This expectancy is not a property interest or right and can be terminated without notice. Clearly, the deceased had every legal right to change the named beneficiary in his policy.

Defendant Briece argues that while this may be the letter of the law, equities arise in her favor which mandate a different result. In support of her argument, defendant cites Candler v. Donaldson, 272 F.2d 374 (6th Cir. 1959), which applied Michigan law to a similar fact situation. In Candler, the husband

changed the beneficiary of his life insurance policy from his wife to his mother while divorce proceedings were pending. He did so while under a general injunction to maintain his insurance policies in force and not to dispose of any property pending the determination of the divorce litigation. Six weeks later, before a final decree was entered, the husband died.

In an interpleader action, the federal district court held in favor of the mother. The Sixth Circuit Court of Appeals reversed. After noting the general rule that the insured has the right to change the beneficiary unless that right is limited by the policy itself, the court then held that equities arose in favor of the first beneficiary which denied the insured the right to make

such a change. The court relied on the following equities:

1) The policy involved had to be considered by the court in adjudicating the property rights of the parties.

2) The purpose of the court's temporary order was to preserve the status quo between the parties until the final adjudication of property rights could be made.

3) The husband violated the court's order.

4) The new beneficiary, the insured's mother, had no offsetting equities of her own and was a pure donee beneficiary.

Although Candler is similar to the case now before this Court, there are two glaring differences which do not permit this Court to follow the Candler decision. First, the husband in Candler changed the designated beneficiary after he had been ordered by a court not to do

so. In contrast, Ronald Briece changed the beneficiary before there was any such order issued. Second, under the law of Michigan, a divorce action does not abate with the death of one of the parties, Webb v. Webb, 375 Mich. 624, 134 N.W.2d 673 (1965), while a divorce action in Illinois does. These two differences make the Candler decision inapplicable in this instance.

In summary, Ronald Briece lawfully changed the beneficiary designation in his life insurance policy from his estranged wife to his parents. He did so pursuant to the terms of the policy, and he was not violating any order of court when he did so. The temporary restraining order entered on April 28, 1981 enjoining him to reinstate his wife as beneficiary abated with the

divorce action upon the death of the insured and has no further force or effect.

For the foregoing reasons, this Court holds that the plaintiffs are entitled to the proceeds of the life insurance policy, and their motion for summary judgment should be sustained.

C. Defendant Connecticut General Life Insurance Company's Motion For Summary Judgment.

Defendant, Connecticut General Life Insurance Company, has moved the Court for summary judgment on its counterclaim for interpleader against the plaintiffs and the defendant Briece and for discharge from all further liability in this matter.

As a result of Ronald A. Briece's death on May 2, 1981, life insurance benefits in the amount of $92,000

are now due and payable by defendant Connecticut General Life Insurance Company. It is clearly apparent from the pleadings that there are conflicting and adverse claims to the proceeds. The defendant insurance company is exposed to the hazard of multiple payments for a single liability because of the conflicting claims. The benefits of the policy have been paid into the registry of this Court and have been invested in 90-day interest-bearing Treasury Bills of the United States, pursuant to this Court's order dated October 30, 1981. Therefore, the insurance company's counterclaim for interpleader against the plaintiffs and the defendant Briece is sustained, and the insurance company is discharged from any further liability in this matter. Equitable Life Insurance Company of Iowa

v. Gilman, 114 F.Supp. 387 (W.D. Mo. 1953).

Defendant Connecticut General Life Insurance Company also requests the Court to allow it attorneys' fees in the sum of $1,740.00 plus its costs to be paid from the proceeds deposited into the registry of the Court.

Plaintiffs and defendant Briece have no objection that the defendant insurance company be discharged, but they oppose its request for an award of attorneys' fees and costs. It is within the discretion of the Court to award attorneys' fees in statutory interpleader actions. After duly considering the matter, the Court finds that the disputed claims are of a kind that arise in the ordinary course of an insurance company's business, and therefore, the Court de-

clines to award attorneys' fees and costs to the defendant insurance company. See Minnesota Mutual Life Insurance Company v. Gustafson, 415 F.Supp. 615 (N. D. Ill. 1976).

For the reasons stated, it is hereby

ORDERED that plaintiffs' motion for summary judgment is sustained. It is further

ORDERED that defendant Briece's motion for summary judgment is denied. It is further

ORDERED that defendant Connecticut General Life Insurance Company's motion for summary judgment for interpleader and discharge is sustained, and its motion for summary judgment for an award of its attorneys' fees and costs is denied. It is further

ORDERED that all parties are to bear their own costs.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

Kansas City, Mo.

December 23, 1981.

Section 501. Temporary relief.

In all proceedings under this Act, temporary relief shall be as follows:

(a) Either party may move for:

(1) temporary maintenance or temporary support of a child of the marriage entitled to support, accompanied by an affidavit as to the factual basis for the relief requested;

(2) a temporary restraining order or preliminary injunction, accompanied by affidavit showing a factual basis for any of the following relief:

(i) restraining any person from transferring, encumbering, concealing or otherwise disposing of any property except in the usual course of business or for the necessities of life, and, if so restrained, requiring him to notify the moving party

and his attorney of any proposed extraordinary expenditures made after the order is issued;

* * *

(iv) providing other injunctive relief proper in the circumstances; or

(3) other appropriate temporary relief.

* * *

Section 503. Disposition of property.

* * *

(c) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property without regard to marital misconduct in just proportions

considering all relevant factors, including:

(1) the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse as a homemaker or to the family unit;

(2) the value of the property set apart to each spouse;

(3) the duration of the marriage;

(4) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;

(5) any obligations and rights arising from a prior marriage of either party;

(6) any antenuptial agreement of the parties;

(7) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(8) the custodial provisions for any children;

(9) whether the apportionment is in lieu of or in addition to maintenance; and

(10) the reasonable opportunity of each spouse for future acquisition of capital assets and income.

* * *

Section 504. Maintenance.

(a) In a proceeding for dissolution of marriage or legal separation or declaration of invalidity of marriage, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse, only

if it finds that the spouse seeking maintenance:

(1) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs, and

(2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home, or

(3) is otherwise without sufficient income.

(b) The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, after consideration of all relevant factors, including:

(1) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) the standard of living established during the marriage;

(4) the duration of the marriage;

(5) the age and the physical and emotional condition of both parties; and

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

* * *

CERTIFICATE OF SERVICE

I, Sara L. Johnson, an attorney not a member of the Bar of this Court, certify that on July 1, 1983 three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit were served upon Loeb H. Granoff, attorney for Respondents, by depositing them in a United States mailbox, with first class postage prepaid, addressed to him at RICH, GRANOFF, LEVY & GEE, 2300 City Center Square, P. O. Box 26278, Kansas City, Missouri 64196.

Sara L. Johnson

Supreme Court, U.S.
FILED
AUG 3 1983
ALEXANDER L. STEVAS,

No. 83-115

In the Supreme Court of the United States

October Term, 1983

BONNIE J. BRIECE,
Petitioner,

vs.

WILLIAM E. BRIECE and
GLADYS G. BRIECE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under Illinois law a TRO abated upon the abatement of an Illinois divorce suit, which suit itself concededly abated under Illinois law before a scheduled evidentiary hearing could be held on the issues raised by the TRO.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is inaccurate and incomplete in the following material respects:

1. No court, state or federal, ever determined that petitioner was physically disabled and financially dependent on the insured. Petitioner's assertion (Petition, p. 4) that such "relevant facts" are undisputed is incorrect.

2. The subject interlocutory order was a TRO only. It was entered by the Illinois divorce court before relevant evidence could be heard, the equities weighed, appropriate

findings made, and the issues raised by said TRO decided pursuant to petitioner's application for a preliminary injunction.

3. The hearing on the application for a preliminary injunction never took place because the insured died several days prior to the scheduled hearing date, whereupon petitioner concedes the Illinois divorce suit abated.

4. At no time before his death did the insured learn that the TRO had been entered, a fact found by the district court which petitioner has never denied.

5. The subject beneficiary change was effected by the insured and the insurance company pursuant to the insurance contract. The change was effected prior to the entry of the TRO and at a time when there were no outstanding court orders prohibiting the change.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 17 makes it plain that certiorari will be granted only in cases involving issues of genuine public importance, not in situations of private concern just to the parties. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

Petitioner's own formulation of the "Questions Presented" confirms that no such special and important reasons for granting certiorari exist here. No federal question is involved and no Constitutional issue is presented. Moreover, since this is a diversity case involving Illinois law only, the decision below, which is based on Illinois law, is *not* in conflict with a decision of any other federal circuit.

It is an elementary rule of law that, in an action which has concededly abated upon the death of a party, all prior interlocutory orders also abate which were entered before relevant evidence can be heard, the equities weighed, and the issues adjudicated in a final decree. 24 Am.Jur.2d, Divorce and Separation, §183.

This is *exactly* what happened here. The court of appeals below so concluded and its decision, affirming the district court, is clearly in accordance with the applicable law of Illinois. *Dietz v. Speybroeck*, 225 Ill.App. 133 (1922); *Howard v. Howard*, 49 Ill.App.3d 441, 364 N.E.2d 464 (1977); *Bushnell v. Cooper*, 289 Ill. 260, 124 N.E. 521 (1919); *In re Estate of Chandler*, 90 Ill.App.3d 674, 413 N.E.2d 486 (1980).

Petitioner's assertion that the decision below is in conflict with a decision of the Sixth Circuit is untrue. *Candler v. Donaldson*, 272 F.2d 374 (6th Cir. 1959) involved an application of the law of Michigan, not Illinois.

The issue of abatement present here was neither raised by the parties nor considered by the Sixth Circuit. Moreover, in *Candler* there was a finding that the insured had willfully violated a preliminary injunction (not a TRO) which had been entered after a hearing and prior to the beneficiary change. A TRO entered after a lawful change had been effected, and before a scheduled evidentiary hearing could be held, was not involved.

Petitioner's reliance on *Travelers Insurance Co. v. Daniels,* 667 F.2d 572 (7th Cir. 1981), is specious. Unlike the instant case, *Travelers* involved the enforcement of a final judgment, not a purely interlocutory order which, as here, the insured was unaware of and never had an opportunity to resist before death intervened to abate the action.

Petitioner's false assertion that the instant decision will hamper an Illinois divorce court's ability to implement its interlocutory orders ignores all of the controlling Illinois cases cited and discussed by each of the courts below.

Had the Eighth Circuit reached an opposite conclusion, a grave injustice would have been inflicted upon both respondents and the deceased insured who, undeniably, had the express contractual right to effect the subject change. The court of appeals recognized this when it granted respondents' petition for rehearing, withdrew its initial decision, and finally affirmed the district court's judgment in favor of respondents.

Petitioner's assertion that the decision below "may have broader ramifications for equity jurisdiction in general" (Petition, p. 26) is manifestly untrue. Respondents can only assume that such a statement is motivated by an overzealous effort to "package" this routine diver-

sity case, which is clearly of interest only to the parties involved, in such a way as to make it superficially appear to satisfy the stringent requirements of Supreme Court Rule 17.

Although petitioner insists that she should have won below, not respondents, her disappointment scarcely provides an objective basis for certiorari. Moreover, it does not change the fact that justice ultimately prevailed.

CONCLUSION

Petitioner has failed to offer a single compelling reason why a writ of certiorari should be granted. Accordingly, the instant petition should be denied.*

Respectfully submitted,

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Attorneys for Respondents

*Counsel for petitioner are able lawyers who are well aware of the expense involved in filing a proper response to a petition for certiorari. They are also cognizant of the time it takes for this Court to consider such a petition. Since the instant petition is blatantly frivolous, an award of damages (sufficient to cover respondents' printing and legal expense) should be considered pursuant to Supreme Court Rule 49.2 in order to discourage exploitation and abuse of Rule 17 in other routine diversity cases.

CERTIFICATE OF SERVICE

I, Charles A. Blackmar, Counsel of Record for Respondents, hereby certify that I have this day caused three (3) copies of this Brief in Opposition to Petition for Writ of Certiorari to be served on Counsel of Record for Petitioner by depositing the same in a United States post office, with first-class postage prepaid, addressed to Allan Horwich at Schiff Hardin & Waite, 7200 Sears Tower, Chicago, Illinois 60606. All parties required to be served have been served, said service having been effected in the manner hereinabove stated.

Dated this 1st day of August, 1983.

CHARLES A. BLACKMAR
Counsel of Record for Respondents